IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-9061

THOMAS J. WALSH, JR.,
dba TOM WALSH & CO.,
Petitioner

v.

E. A. SCHLECHT, et al., as Trustees
of Five Oregon-Washington Carpenters-
Employers Trust Funds,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

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December 24, 1975

INDEX

CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

The petitioner Thomas J. Walsh, Jr., dba Tom Walsh & Co., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Oregon entered in this

proceeding on October 2, 1975.[1]

OPINION BELOW

The opinion of the Supreme Court of Oregon is reported at 75 Or. Adv. Sh. 3326, 540 P.2d 1011. It also appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Oregon was entered on October 2, 1975. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC § 1257(3).

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[1]A single judgment and opinion was rendered by the Supreme Court of Oregon in five consolidated cases. The respondents are all of the trustees (plaintiffs below) in each of the five cases. Plaintiff was the sole defendant below in each of the cases.

QUESTION PRESENTED

Does a Subcontractors Clause in a labor agreement, as applied to require a signatory employer to pay trust fund contributions on behalf of employees of a non-union subcontractor who does not contribute to the trusts, violate § 302 of the Labor-Management-Relations Act of 1947 (29 USC § 186), which prohibits employer contributions to trust funds unless they are established for the sole and exclusive benefit of employees (and certain relatives) of the contributing employer and employees (and certain relatives) "of other employers making similar payments?"

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to

employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective dates; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers ... to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value ----------

(1) to any representative of any of his employees who are employed in an industry affecting commere;

....

(c) The provisions of this section shall not be applicable ... (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive

benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer ... ;

(6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds;....

STATEMENT OF THE CASE

Petitioner, a builder of multiple unit housing, became the general partner in a limited partnership organized to construct, own and operate a 56-unit, low income housing project known as Oak Hill, in Salem, Oregon (Tr 17-21, 112; Pl. Ex. 3). The project was built under a subsidized rental program administered by the U.S. Dept. of Housing and Urban Development (HUD).

The limited partnership acted as its own general contractor on the Oak Hill project. The carpentry work of framing the buildings was subcontracted to Lloyd Jackson, a non-union employer, for a fixed price (Tr 24-25; D. Ex. B).

Petitioner is a signatory to a 1969 Memorandum Agreement (P. Ex. 1) binding him, as an employer, to the terms of the Carpenters Master Labor Agreement and to those of the five Trust Agreements referred to therein (P. Ex. 4, 7). These agreements require signatory employers to pay into five separate trust funds a total of 96¢ per hour of work by carpenter employees (P. Ex. 7, 8). Three of the trust funds provide direct benefits to workmen (the health and welfare, pension and vacation funds), while two of the funds benefit the industry generally

(apprenticeship and construction industry advancement funds).

The applicable Carpenters Master Labor Agreement (P. Ex. 7) contained in Article IV a Subcontractors Clause providing:

> "If an employer, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure, or other work to any person or proprietor who is not signatory to this Agreement, the employer shall require such subcontractor to be bound to all the provisions of this Agreement, or such employer shall maintain daily records of the subcontractors employes [sic] job site hours, and be liable for payment of these employees wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement. ...."

Agreements with HUD required that workmen on the Oak Hill project be paid the prevailing "wages," including the cost of fringe benefits, as provided in the

Davis-Bacon Act, 40 USC § 276a (Tr 26). Petitioner's carpentry subcontractor Jackson was not a signatory to any labor agreement or other agreement providing for him to pay contributions to the carpenter's trust funds. Accordingly, Jackson did not make contributions for his employees to these trust funds (Tr 122). It is stipulated that Jackson, instead, paid directly to his carpenter employees on the Oak Hill job an additional amount of 96¢ per hour, equaling the amounts which a union employer would be required to contribute to the carpenters trust fund (Tr 123).

More than one year after completion of the Oak Hill project, the trustees of the five carpenters trust funds commenced this litigation in the Circuit Court of Multnomah County, Oregon, seeking an accounting and a decree requiring peti-

tioner to pay the contributions of 96¢ per hour as specified in the Carpenters Master Labor Agreement into the trust funds for all hours worked on the Oak Hills job by Jackson's non-union carpenter employees. The total contributions allegedly due to all five funds for the hours of these workmen on the Oak Hill job is $6,172.70 (P. Ex. 8). Since Jackson had already been paid for his subcontract work a fixed price which included the wages and fringe benefits paid by him to his non-union carpenter employees, the trustees sought, in effect, to impose upon petitioner in this litigation liability for a second payment of the fringe benefits already paid to these workmen.

In the trial court petitioner pleaded as an affirmative defense that the Subcontractors Clause of the Labor Agree-

ment was illegal, as in conflict with 29 USC § 186, if interpreted and applied to require petitioner to pay contributions into the carpenters trusts for the benefit of Jackson's employees. Demurrers of the trustees to this affirmative defense were sustained.

After a trial, the Circuit Court held that petitioner was obligated by the terms of the Subcontractors Clause to make contributions for the benefit of Jackson's carpenter employees to the five carpenters trusts. The Circuit Court, however, further held that equity would not require a "double payment" by petitioner to the three trust funds which provide direct benefits to workmen. Accordingly, the Court declined to require contributions to these three trust funds, and entered a decree requiring contributions only to

the two trust funds benefiting the industry generally.

The trustees appealed to the Oregon Supreme Court from the Circuit Court's refusal to require contributions to the three direct benefit funds. Petitioner cross-appealed from the ruling of the Circuit Court which sustained the demurrers of the trustees to his affirmative defense based on 29 USC § 186.

The Supreme Court of Oregon reversed the Circuit Court's refusal to require petitioner to make contributions to the three direct benefit funds. It also rejected petitioner's cross-appeal. The result is that petitioner has been ordered to make contributions to all five carpenters trust funds on behalf of the non-union carpenter employees of Jackson, the subcontractor.

The opinion of the Supreme Court of Oregon specifically holds that enforcement of the Subcontractors Clause by requiring petitioner to make contributions for the benefit of the carpenter employees of the subcontractor Jackson to the five trust funds does not violate 29 USC § 186.

REASONS FOR GRANTING THE WRIT

1. THE INTERPRETATION OF 29 USC § 186 BY THE SUPREME COURT OF OREGON IN THIS CASE PERMITS UNIONS TO REQUIRE CONTRIBUTIONS TO TRUST FUNDS ON BEHALF OF EMPLOYEES WHO ARE LEGALLY INELIGIBLE TO BENEFIT FROM THE FUNDS, AND CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE U. S. COURT OF APPEALS FOR THE SECOND CIRCUIT AND OF TWO U. S. DISTRICT COURTS

The decision below permits a union to penalize a union general contractor for using a non-union subcontractor by requiring the general contractor to make payments on behalf of the employees of the non-union subcontractor to trust funds from which those employees are legally ineligible to draw benefits.

It is clear that 29 USC § 186 prohibited Jackson from paying contributions for his employees directly into the carpenters trust funds. Since Jackson was not a party to any collective bargaining agreement or other written agreement specifying a detailed basis for such contributions, the exception of subsection 186(c)(5) to the prohibition of subsection 186(a)(1) is not met.

The U. S. Court of Appeals for the Second Circuit has held in two decisions, in accord with U.S. District Court

decisions in Tennessee and Pennsylvania, that subsection 186(c)(5), in effect, prohibits payment of benefits by union-employer trust funds to anyone other than present or former employees of employers lawfully contributing to such trusts. In the leading case of Moglia v. Geohegan, 403 F.2d 110 (CA 2, 1968), cert. den. 394 U.S. 919 (1969), the court held that subsection 186(c)(5) prohibits payment of benefits from such a trust to beneficiaries of a deceased employee whose employer had made contributions to the trusts for many years which were illegal for lack of the written agreement required by that subsection. In so holding, the court stated:

> "Only employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 Trust."
> (403 F.2d at 116)

Moglia followed two U. S. District Court decisions, Rittenberry v. Lewis, 238 F. Supp. 506 (E.D. Tenn., 1965), and Bolgar v. Lewis, 238 F. Supp. 595 (W.D. Pa. 1960), both denying pension fund benefits to former employees for whom the employer had made no contribution to the fund because of first becoming a signatory to the labor agreement after the plaintiff's retirement. After quoting subsection 186(c)(5), the Court in Rittenberry concluded:

> "It is apparent from the foregoing language that the trust [sic] authorized by Section 302 were for the payment of benefits to employees of employers lawfully making contributions to union welfare trusts."
> (238 F. Supp. at 509)

Most recently, the U. S. Court of Appeals for the Second Circuit, quoting Moglia, held that payment of benefits from union-employer trust funds to employees of non-contributing employers is prohibited by subsection 186(c)(5). In re

Typo-Publishers Outside Tape Fund, 478 F.2d 374 (CA 2, 1973), cert.den. 414 U.S. 1002 (1973).[2]

Thus, employees of Jackson, a non-signatory subcontractor, could not lawfully be paid benefits from any of the carpenters trust funds because they are not employees of an employer contributing to the funds, as required by subsection 186(c)(5). Contributions to the trusts by petitioner on behalf of Jackson's employees would not, therefore, meet the requirements of subsection 186(c)(5) because they are not for the benefit of employees of "other employers making similar payments" to the trusts. Jackson has made no payments to the trusts (Tr 122).

Making contributions for Jackson's emp-

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[2]See also Blassie v. Kroger Co., 345 F.2d 58, (CA 8, 1965), at 71, holding that the statute prohibits trusts from paying benefits to persons "who have never been in the active employ of a contributing employer or to those who, although having been in active employment, were not covered by employer contributions."

loyees through petitioner[3] may meet the written agreement requirement of subsection 186(c)(5), but it does not meet the requirement that beneficiaries of the trust be solely employees of contributing employers.

The Oregon Supreme Court appears to recognize that its decision in this case is in conflict with Moglia v. Geohegan, supra. At footnote 4, the Oregon Supreme Court states (App., p. 1e, 1f):

> "We have not overlooked the statement by the Court in Moglia v. Goehegan, [sic] 403 F.2d 110 (CA 2, 1968) (at 116), that 'Only employees and former employees of employers who are lawfully contributing to a union pension fund may qualify as beneficiaries of a Section 302 trust.' It does not necessarily follow, however, that an employer may not make contributions to a trust fund under facts such as those involved in this case, at least when required to do so by the terms of a written agreement. In any event, as we read Moglia, that statement was not necessary to that decision in that case, in which there was no written agreement, and it is not binding upon this court in this case.

[3]At the trial, a union representative admitted that the carpenters trusts will not accept contributions from a non-signatory employer, but would accept contributions on behalf of the employees of such an employer if made under report forms filed with the trusts by a signatory employer, such as petitioner (Tr 166,214). The report form (P.Ex.8), however, implies that the employees listed on it are employed by the reporting signatory employer.

The Oregon Supreme Court relies on Kreindler v. Clarise Sportswear Co., 184 F.Supp. 182 (S.D.N.Y. 1960), decided eight years before the Moglia decision of the Second Circuit Court of Appeals. The district court in that case held that an agreement requiring an employer to make contributions to trust funds based upon hours of his own employees as well as hours of non-signatory subcontractors'

employees did not violate § 186.

The decision in Kreindler is distinguishable. The agreement there included the payroll of non-union subcontractors in calculating the amount of trust contributions required from signatory employers, but did not require contributions of the signatory employer to be for the benefit of or on behalf of the non-union subcontractor's employees. Unless so distinguished, Kreindler appears to be inconsistent in principle with the later Moglia and Typo-Publishers decisions of the Court of Appeals for the Second Circuit.

2. THE EFFECT OF THE DECISION BELOW IS TO REQUIRE A UNION CONTRACTOR ON A JOB SUBJECT TO THE DAVIS-BACON ACT TO PAY DOUBLE FRINGE BENEFITS IF HE USES A NON-UNION SUBCONTRACTOR.

The HUD agreements in this case subjected the Oak Hills project to the Davis-Bacon Act, 40 USC § 276a (Tr 26). That Act requires employers to pay the "prevailing wages," including fringe benefits, to or for the benefit of all workmen on the job. The Act permits payment of fringe benefits either to union-employer trusts for the benefit of the workmen, or directly to the workmen.

In a job under the Davis-Bacon Act, the general contractor obviously must require his subcontractors to comply with that Act. The petitioner did so in this case, with respect to subcontractor Jackson (Tr 104-106, D. Ex. B). Since Jackson was not signatory to any contract providing for contribution of the fringe benefits to the carpenters trusts, he could and did pay them only directly to his men, in addition to their regular

wages (Tr 106, 123).

The decision below requires petitioner, as the general contractor, to pay the amount of the fringe benefits for Jackson's men a second time by a contribution in that amount to the carpenters trusts. This means that a Davis-Bacon Act job will cost a contractor more to perform if he uses a non-union subcontractor. Instead of carrying out the purpose of the Davis-Bacon Act to eliminate unfair competition by non-union employers paying less compensation to their workmen, the decision below applies 29 USC § 186 in a fashion which makes it more expensive for a union general contractor on a Davis-Bacon Act job to use a non-union subcontractor than if he used a union subcontractor. The amount of the penalty or extra expense is a doubling or second payment of the fringe benefits which a non-union sub-

contractor has paid directly to his men, since he cannot pay them into union trust funds.

3. THE DECISION BELOW INVOLVES A QUESTION OF STATUTORY INTERPRETATION IN THE APPLICATION OF 29 USC § 186 TO SUBCONTRACTOR CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS WHICH IS LIKELY TO ARISE IN THE FUTURE.

The use of clauses in collective bargaining agreements which require contractors to subcontract work only to union employers appears to be a growing trend. A recent survey found such clauses in about 75% of collective bargaining agreements in the construction industry. U.S. Bureau of Labor Statistics, Dept. of

Labor, Bull. No. 1864, "Contract Clauses In Construction Agreements," p.25 (1975). This Court recently had occasion to examine the anti-trust aspects of a sub-contractors clause in a non-collective bargaining agreement. Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, ___ U.S. ___, 44 L.Ed. 2d 418 (1975).

The wording of subcontractors clauses varies widely in construction industry collective bargaining agreements. Clauses requiring a signatory general contractor to make payments into union-employer trust funds for employees of non-union sub-contractors, as in this case, are not uncommon. The decision of the Supreme Court of Oregon in this case appears to be the first which expressly sustains the validity of that type of subcontractors

clause against a claim of violation of 29 USC § 186.

If the decision below is not reviewed and corrected, the use of this type of clause will undoubtedly become more wide-spread. In that event this Court will no doubt be called upon in the future to consider the same issue of the validity of such clauses under 29 USC § 186. Review of the Oregon Supreme Court's decision in this case would put this issue to rest at an early date.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Oregon.

Respectfully submitted,

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December 24, 1975

APPENDIX

Opinion of the
Supreme Court of Oregon

IN THE SUPREME COURT OF
THE STATE OF OREGON

No.'s 389-034 through 389-038

E. A. SCHLECHT, et al., as
Trustees, etc.
Appellants

v.

THOMAS J. WALSH, JR.,
dba TOM WALSH & CO.,
Respondent

(October 2, 1975)

Appeal from the Circuit Court
Multnomah County

TONGUE, J.

These five consolidated cases are suits in equity by the trustees of funds established under a labor-management contract against a general building contractor who signed that contract. The suits seek to enforce a provision of the contract that such a general contractor must either require that any nonunion subcontractor engaged by him be "bound to all of the provisions of this Agreement" or else maintain records for the subcontractor's employees "and be liable for payment" of contributions for those employees to the funds established by the agreement for health and welfare, pensions, vacations, apprenticeship and "construction industry advancement."

The nonunion subcontractor paid an amount equal to these "fringe benefits" directly to his employees in addition to their regular hourly wages, which equaled those required by the union contract. No payments, however, were made into the trust funds for any of these benefits.

The trial court held that defendant was required to make such payments to two of the trust funds, but not to the remaining three funds. The basis for that decision was that "it is inequitable" to require defendant to make payments which "amount to double fringe benefits" to the employees of the subcontractor (i.e., trust funds for health and welfare, pensions and vacations), but that "it is equitable" to require that defendant make payments to the last two funds (i.e., apprenticeship and "C.I.A.F."), as "funds which do not accrue benefits directly to the workmen."

Plaintiffs appeal from the decree in the three cases in which the trial court refused to require payments to those three funds. Defendant cross-appeals from the decrees in the two cases in which the trial court ordered defendant to make payments to the other two funds and also from the refusal of the trial court to allow attorney fees in the three cases.

In support of its appeal plaintiffs contend that upon finding that defendant was obligated by the terms

of his contract with the union to make "fringe benefit payments" to the plaintiffs for the employees of its nonunion subcontractor, the trial court erred in holding that as a court of equity it could, in effect, modify the terms of the contract by holding that defendant was required to make payments into only two of the five trust funds upon the ground that it would be "inequitable" to require payments to the remaining three trust funds.

The trial court recognized that "were I in law, having made the findings of fact, I would have no option but to grant judgment in all five cases for the trustees."

In *Wikstrom v. Davis et ux*, 211 Or 254, 315 P2d 597 (1957), we held (at 268) that:

> "Neither courts of law nor of equity have the right or power to make contracts for the parties, or to alter or amend those that the parties have made. It is the intention of the parties, manifested by their words, and not the whim of the court, that must be the guide in construing contracts by the parties thereto. • • •"

To the same effect, see *City of Reedsport v. Hubbard et ux*, 202 Or 370, 385, 274 P2d 248 (1954), holding, in a suit in equity, that:

> "• • • The court has no authority to read into said contract a provision which does not appear therein, nor to read out of it any portion thereof. And this is true, even though the result may appear to be harsh and unjust. The contracts of parties sui juris are solemn undertakings, and in the absence of any recognized ground for denying enforcement, they must be enforced strictly according to their terms. • • •."

In these five consolidated cases the trial court properly concluded that:

> "The labor contract required defendant to make fringe benefit payments to plaintiffs."

Nothing in the terms of the contract justified the court's requirement that payments be made by Walsh

to some of the trust funds, but not to all of them.[6] All the funds have equal standing under the terms of the contract. Payments due to each fund are calculated on the same hours worked per employee. The contract specifies identical legal remedies for failure to pay into any one fund or all of them.

Defendant contends that "the record in this case discloses at least innocent misleading of defendant and unclean hands," as well as laches, in that "the union officials failed to tell defendant until months after completion of the job that payment by Jackson [nonunion subcontractor] of fringe benefits directly to his men • • • would nevertheless leave defendant exposed for payment of the same sums into the trusts for the benefit of Jackson's carpenter-employees."

However, the testimony by defendant to support these contentions was contradicted by testimony offered by the union. The trial court rejected these contentions by its findings of fact and conclusions of law. After examination of the record, we agree with those holdings.[7]

Having so held, the trial court had no authority for "equitable reasons" to deny relief to the union in three of the five cases, while granting such relief in the remaining two cases. It follows that we must reverse the decree of the trial court in those three cases (cases No. 389-034, 389-035 and 389-036) unless we

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[6] The contract provided as follows:

"If a contractor, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure or other work to any person or proprietor who is not signatory to this Agreement, the contractor shall require such subcontractor to be bound *to all the provisions of this Agreement, or* such contractor shall *maintain daily records of the sub-contractors employees job site hours and be liable for payment of these employees wages, travel, Health & Welfare, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this agreement.*" (Emphasis added)

[7] This testimony and these findings are discussed further below in connection with defendant's cross-appeal.

conclude that defendant is entitled to prevail in his cross-appeal, as next discussed.

Defendant's first contention on cross-appeal is that the "Subcontractors Clause" of the Carpenters Master Labor Agreement violates 29 USC § 186, to the extent that it may be applied to require defendant to make contributions to union trust funds for the benefit of employees other than his own, as pleaded in defendant's Fifth Affirmative Defense in each of the five cases. The trial court sustained plaintiffs' demurrers to those affirmative defenses.

It is provided in 29 USC § 186 (a) that:

> "It shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend or deliver, any money or other thing of value—
>
> "(1) to any representative of any of his employees who are employed in an industry affecting commerce . . ."

An exemption is provided in § 186(c)(5) for certain payment by an employer to trust funds, as follows:

> "(c) The provisions of this section shall not be applicable • • • (5) with respect to money or other thing of value paid to a trust fund established by such representative, *for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents)*: Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; • • •." (Emphasis added)

Defendant says that:

> "The net effect of 29 U.S.C. Section 186, with respect to contributions to trusts, is to prevent

an employer from paying contributions to a trust for the benefit of anyone other than his employees or his employees as part of a pool with employees of other covered employers. The leading case on this point is *Moglia v. Goeghegan,* 403 F.2d 110 (CA 2, 1968), *cert. den.* 349 U.S. 919 (1969). • • •"

Defendant also cites other cases as following what he contends to be the rule as stated in *Moglia.*[6]

Defendant also says that:

"The key point of *Moglia* and its progeny is that 29 U.S.C. Section 186 requires that the employer's payments must be for the benefit of his own employees. It is clear that the payments demanded by plaintiffs and awarded by the Circuit Court in two of these cases fail to meet the test of *Moglia,* because defendant Tom Walsh & Co. is being required under the Subcontractors Clause to make payments into the trusts for the benefit of persons who are employees of Jackson, and not his own employees."

As we read *Moglia,* however, the primary holding of that decision was that payments by an employer into such a trust fund must be made pursuant to a *written agreement.* (See 403 F2d at 115-16.) The same is true of most of the *Moglia* "progeny." This is in accord with the purpose of 29 USC § 186 to discourage corruption by prohibiting payments by employers to unions, except for those permitted in accordance with restrictions provided by that statute.[7]

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[6] The cases cited by defendant include: *In re Typo-Publishers Outside Tape Fund,* 344 F Supp 194 (SDNY 1972), *aff'd* 478 F2d 374 (CA 2, 1973), *cert denied* 414 US 1002 (1973); *Insley v. Joyce,* 330 F Supp 1228 (ND 111, ED 1971); *Pidgeon v. Brunswick Port Authority,* 324 F Supp 140 (SD Ga 1971); *Local U. No. 529, U. Bro. of Carpenters, etc. v. Bracy Dev. Co.,* 321 F Supp 869 (WD Ark 1971); and *Doyle v. Shortman,* 311 F Supp 187 (SDNY 1970). See also *Caporale v. Di-Com Corp.,* 345 F Supp 153 (ND 111, ED 1972).

[7] We have not overlooked the statement by the court in *Moglia v. Goeghegan,* 403 F2d 110 (CA 2, 1968) (at 116), that "Only employees and former employees of employers who are lawfully contributing to a union pension fund may qualify as beneficiaries of a Section 302 trust." It does not necessarily follow, however, that an employer may not make contributions to a trust fund under facts such as those involved in this case, at least when required to do so by the terms of a written agreement. In any event, as we read *Moglia,* that statement was not necessary to that decision in that case, in which there was no written agreement, and it is not binding upon this court in this case.

In this case the requirement of such a written contract was satisfied in that defendant had a written contract with the union which required that he make contributions to the trust funds for his own employees and also specifically provided that in the event he engaged a subcontractor to do any work covered by the agreement he would be liable for payments into the various trust funds for the employees of such a subcontractor. None of the cases cited by defendant involves such a written contract provision.

In addition, as pointed out in *Kreindler v. Clarise Sportswear Co.* 184 F Supp 182, 184 (SDNY 1960), also involving payments to a trust fund for employees of a nonunion contractor, in rejecting the defendant's contention that to qualify under 29 USC § 186 such payments must be for the sole and exclusive benefit of the employees of the employer making such payments, the court held:

"• • • There is no basis • • • for the construction of the statute on which counsel for Clarise rely. The Funds are not set up employer by employer with the amounts contributed by each employer set apart for the benefit of his employees. They are of a type contemplated by the statute 'for the sole and exclusive benefit of the employees of such employer • • • (*or of such employees • • • jointly with the employees of other employees* [*sic*] *making similar payments* • • •)' (Emphasis added)

"The construction of the statute contended for by counsel for Clarise would have most serious and unfortunate consequences. An employer whose employees were engaged in two crafts and who were members of two different unions could not lawfully contribute to the welfare fund of either

because neither would be for the benefit of all of his employees.

"The fact that the employees of Clarise's contractors cannot share in the payments based on their payrolls which Clarise has agreed to make does not give Clarise the right to avoid its agreement as illegal."

We agree with that statement.

See also *Bey v. Muldoon*, 223 F Supp 489, 495 (ED Pa 1963), *aff'd*, 354 F2d 1005 (3d Cir 1966), *cert denied*, 384 US 987 (1966); *Budget Dress Corp. v. Joint Board*, 198 F Supp 4 (SDNY 1961), *aff'd*, 299 F2d 936 (2d Cir 1962), *cert denied*, 371 US 815 (1962); and *Doyle v. Shortman*, 311 F Supp 187 (SDNY 1970).

The fact that these cases were decided prior to *Moglia* does not, in our opinion, mean that they are "not of value," as contended by defendant, not only because the decision is not binding upon this court, but because *Moglia* did not involve a subcontractor and there was no written agreement in *Moglia*, as in this case.

For these reasons, we hold that the trial court did not err in sustaining plaintiffs' demurrer to defendant's Fifth Affirmative Defense.

Defendant's second contention on cross-appeal is:

"Union officials failed to give defendant any 30-day delinquency notice as required by the Subcontractors Clause as a condition to defendant's liability for contributions for the benefit of a nonunion subcontractor's employees. The Circuit Court erred in failing to sustain this defense."

In support of that contention defendant points out that Article IV of the labor agreement provides that the union will notify the employer "within thirty (30) calendar days of any delinquent payment" to the trust funds.

Defendant says that if any such payments were owed to the trust funds for Jackson's employees "they were due on the 25th of July, 1971 through the 25th

day of December, 1971" and that "the evidence set forth in the records shows that no notice was given of any delinquency in payments • • • until November 16, 1972 • • •."

To the contrary, however, the trial court found that:

"6. Defendant was notified by union officials and by their attorney of defendant's responsibility to pay fringe benefit contributions to plaintiffs as required by the union contract.

"7. Defendant was informed by union officials and by their attorney that if Lloyd Jackson did not make the required fringe benefit contributions to plaintiffs that defendant was required under the union contract to make said payments."

We have examined the record and find that it supports these findings, with which we agree. The contract does not require that written notice be given.[6] Several witnesses testified that before the project in question was started it was made clear to defendant that he was responsible for payments into the trust funds for the employees of the nonunion subcontractor. In addition, and perhaps of more importance, at least one of the union representatives testified that at subsequent conferences with defendant on or about August 2 and August 12, 1971, within 30 days of the completion of the project, the defendant was again told that as the general contractor he was responsible or "obligated" for payment of "these items," and that he was "requested to take care of his obligation."

While much of this testimony was denied by defendant and while it may not be as clear as might be desired, after reading the entire record and after ac-

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[6] The contract provides as follows:

"The Union agrees to notify the employer, person or proprietor within thirty (30) calendar days of any delinquent payment for wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions owed by the subcontractor and to further issue a certificate to the employer when these payments have been made. (Clarification: With respect to fringes the 30 day period starts on the day after the report is due to the trust administrator.)"

cording to the trial judge the benefit of his better opportunity to observe the demeanor of the various witnesses as they testified, as is usual in cases in which there is a conflict in the testimony, we agree with the findings of fact by the trial court. It follows that this assignment of error on defendant's cross-appeal must also be denied.

Defendant's final contention on cross-appeal is that the trial court erred in denying payment to defendant for the attorney fees incurred by him in the three cases in which the trial court denied relief to the union. Because, however, we have reversed the decrees of the trial court in those cases it follows that we need not consider this contention.

For all of these reasons, we reverse the decrees of the trial court in cases Nos. 389-034, 389-035 and 389-036, and affirm its decrees in cases Nos. 389-037 and 389-038.

Mandate of the Supreme Court of Oregon

STATE OF OREGON

SUPREME COURT

Mandate

E. A. SCHLECHT, et al., as Trustees, etc.
Appellants

v.

THOMAS J. WALSH, JR., dba TOM WALSH & CO.,
Respondent

Appeal from Multnomah County

No. 389-034

This cause on September 8, 1975, having been duly argued and submitted upon questions arising on the record, and the court having fully considered said questions as well as suggestions of counsel in their argument and briefs finds there is error

as alleged.

IT THEREFORE IS ORDERED and DECREED that the decree entered in this cause in the court below is reversed as to case number 389-034 in conformity with the opinion of the court herein.

IT FURTHER IS ORDERED that appellants recover from respondent their costs and disbursements in this court taxed at $149.59 and the further sum of $500.00 allowed as attorney fee on appeal.

IT FURTHER IS ORDERED that this cause is remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.

ENTERED at Salem, Oregon, this 2nd day of October, 1975.[1]

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[1]Identical mandates were entered in each of the other 4 cases. 1/5 of the total costs and attorney's fees awarded in the Oregon Supreme Court is allocated to each of the five consolidated cases.